In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1212

INDEPENDENT STAVE COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19-37) is not yet officially reported. The Board's decision and order (R. 217-230, 233-236) are reported at 148 N.L.R.B. 431.

JURISDICTION

The decree of the court of appeals (Pet. 51-52) was entered on December 15, 1965. A petition for

rehearing was denied on February 8, 1966 (Pet. 2). The petition for certiorari was filed on April 13, 1966. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence in support of the Board's finding that the employer violated its collective bargaining obligation to the certified international union by executing, with one of the union's locals, a contract which the international had rejected, and by refusing to bargain further with the international.

2. Whether the remedy prescribed by the Board was proper.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 3-4 of the petition.

STATEMENT

In September 1955, Coopers International Union of North America, AFL-CIO, was certified by the National Labor Relations Board as the representative of certain employees of the Independent Stave Company, a manufacturer of barrels. Thereafter, the international negotiated with the company about wages, hours, and working conditions of the employees represented by it; Local 42, affiliated with the international, participated in these negotiations. (R. 219, 224-224.)

On June 26, 1963, the company met with George Calvert, a representative of the international, and officers of Local 42 to negotiate a new contract (R. 219; 29, 86). Proposals presented by the international were discussed, but no agreement was reached (R. 219; 30). A second meeting was held on July 11 to review further the international's proposals (R. 219-220; 30). In both meetings, Calvert was the principal spokesman for the employees (R. 219-220; 32). At the close of the July 11 meeting, it was agreed to meet again the next day to discuss only the non-monetary clauses of the proposed contract (R. 220; 30, 52-53, 97).

On the morning of July 12, Dean Rhoten, the president of Local 42, and other members of the local's bargaining committee informed Calvert that Local 42 desired to submit to the company a lower wage proposal than had previously been made.[1] Calvert pointed out that such a proposal had been rejected by the international's executive board before negotiations had begun. When Rhoten persisted, Calvert, after checking with the international's president, Doyle, by phone, stated that he was not authorized by the international to negotiate on that basis. He told Rhoten to so inform the company and state that he would not attend the bargaining session that day. (R. 220; 31, 47, 88.)

At that session, Rhoten told the company that there had been a "disagreement" between the inter-

[1] During this conference, the company's attorney called Calvert to inform him that the next scheduled meeting would be held in the plant instead of in his office (R. 46).

national and the local, that Calvert would not attend the meeting, and that the company was now "dealing" with the local (R. 220-221; 89, 97). The company's president responded that such an arrangement was "fine with him" (R. 221; 97). The company then made what it described as its "final offer" to the local's bargaining committee. Although only non-monetary items were to have been discussed at this meeting, the company's offer included monetary items. (R. 221; 102.) On July 15, the company notified the local by letter that it had until July 18 to accept or reject the final offer (R. 221; 108, 76). The company did not send a copy of the letter, or of its final offer, to the international (R. 222; 32).

On July 16, the international sent a telegram to the company's president and attorney and to Rhoten advising them that under the international's constitution "no collective bargaining agreement between Independent Stave and Local 42 can be entered into binding and effective until the terms first approved by majority of International Executive Board" (R. 221; 124, 39-40, 54).[2] Rhoten discussed this telegram with the company's attorney, who suggested that the contract be signed because Calvert had "walked out" (R. 221; 90). On July 18, the contract was signed by Local 42 and the company. A space for the signature of the international's representative, Calvert, was provided. (R. 221; 79.)

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[2] Section 85 of the international's constitution authorizes its locals to make their own collective bargaining agreements, but states that such contracts are subject to the approval of the international's general executive board (R. 224; 34).

On July 21 or 22, Rhoten, at the company's suggestion, presented the contract to Calvert. This was the first knowledge that the international had that an agreement had been executed. (R. 221-222; 32, 91-92.) Calvert refused to sign, but agreed to forward the contract to the international's executive board (R. 222; 120, 32-33), which on August 1 rejected the agreement and so informed the company by letter (R. 222; 41, 55). In the same letter, the international's president requested the company to meet with international representatives "for the purpose of resumption of negotiations for a collective bargaining agreement covering" the company's employees (R. 222; 124-125). The company replied that in view of Calvert's failure to attend the July 12 meeting the international was unreasonable in demanding resumption of bargaining sessions (R. 222; 126-127, 59, 82). Later, when Calvert and the union's attorney sought to arrange a meeting with the company's president, the latter's receptionist informed them that "Mr. Boswell [the president] will not see you at all" (R. 222-223; 33).

The Board found that the international was at all times the bargaining representative of the company's employees; that it never delegated to Local 42 the power to bind it by contract without its approval; and that, in any event, the international made clear to the company before execution of the 1963 contract that Local 42 had no authority to speak for the international. The Board concluded that the company had violated Sections 8(a)(5) and (1) of the Act by entering into a contract with Local 42 and by refus-

ing to bargain further with the international (R. 224-226). It ordered the company to cease and desist from giving effect to its 1963 agreement with Local 42 and from refusing to bargain with the international, and to bargain on request with the international (R. 227-228, 234). The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. 19-37).

ARGUMENT

1. Petitioner asks this Court to decide whether it is a violation of Section 2(13) of the National Labor Relations Act (which provides that neither actual authorization nor subsequent ratification shall be controlling in determining whether an agency relation has been established) for an international union to limit the negotiating authority of its local *after* the local has already reached an agreement with the employer (Pet. 3, 11-12). That issue, however, is not presented by the facts of this case, which—as petitioner itself acknowledges—"are almost unique" (Pet. 11). The Board found (*supra*, p. 5), and the court of appeals agreed (Pet. 31-32), that the international had never authorized Local 42 to negotiate a contract on its own, and that the company was at all times aware that any agreement reached was subject to the approval of the international.[3] Since the international,

[3] As the court below pointed out (Pet. 31):

> The petitioner, recognizing International's status as the sole bargaining agent, called Calvert on the morning of July 12, 1963, to notify him of a change in the meeting place for the scheduled negotiating session. * * * Peti-

not the local, was the certified bargaining representative, and since the international neither actually nor apparently delegated its representational duties to the local, the Board properly concluded that the company violated Sections 8(a)(5) and (1) of the Act (dealing with refusals to bargain collectively and interference with employees' rights) by negotiating a contract with Local 42 and by refusing to bargain further with the international. See *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678.

2. There is no merit to petitioner's contention (Pet. 14-18) that the Board exceeded its remedial authority in requiring the company to cease giving effect to the contract with Local 42. Since the core of the refusal to bargain was the company's action in entering into a contract with Local 42 which the international had rejected, it was clearly appropriate for the Board to require that the company not only bargain with the

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tioner was well aware of the disagreement over wage demands between Calvert and Local 42 as being the reason why Calvert did not attend the July 12th meeting, which incidentally, was originally scheduled to deal only with non-monetary matters. Petitioner also ignored Doyle's telegram of July 16th calling attention to the fact that no binding agreement could be made with Local 42 unless and until the terms of the agreement were first approved by International. In spite of the warning, petitioner, two days later on July 18th, entered into the agreement now in question. Petitioner asked that the officers of Local 42 forward a copy thereof to International. The fact that the agreement contained a place for Calvert's signature is an indication that petitioner realized International had not abandoned its status as bargaining agent for petitioner's employees. * * *

international on request but so bargain free from any commitments or restraints imposed by the improper contract with Local 42. It was equally appropriate for the Board to make plain in its order that the company, while obliged forthwith to negotiate with the international for a new contract, was not thereby free in the meantime to alter unilaterally the terms and conditions of employment that had been established for its employees as a result of the existing contract. Order provisions of this type are clearly reasonable and have been uniformly sustained by this and other courts. *E.g.*, *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 364-365; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 340-342;[4] *Garment Workers* v. *National Labor Relations Board*, 366 U.S. 731, 735, n. 7, enforcing 122 N.L.R.B. 1289, 1295; *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 246 (C.A. 7), certiorari denied, 320 U.S. 746.[5]

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[4] Although the order in *J. I. Case, supra,* contained more qualifications than the order in this case, the violation there was more limited. The making of the individual contracts was not itself unlawful; the violation was in using the contracts to defeat the employees' rights of self-organization (321 U.S. at 333-334). Here, on the other hand, the execution of the contract with Local 42 constituted the central element of the unlawful refusal to bargain.

[5] *National Labor Relations Board* v. *Golden State Bottling Co.*, 353 F. 2d 667 (C.A. 9), is indeed contrary to these authorities; but that case is presently pending before the Ninth Circuit on the Board's petition for rehearing, on both the remedy and another point, the court of appeals having on April 5, 1966, vacated its earlier order denying rehearing and granted the parties leave to file briefs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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I. Reply to Point 1.

1. Apparently conceding that the issue posed by petitioner—whether an International union can limit the negotiating authority of its Local after the Local has already reached agreement with the company—represents such a fundamental departure from established agency principles with such grave implications for stable col-

lective bargaining as to be worthy of this Court's attention—the government attempts avoid the grant of the writ by declaring that this issue is not presented at all! This effort at obfuscation is performed in one all-important sentence: "The Board found (*supra*, p. 5) and the court of appeals agreed (Pet. 31-32), that the international had never authorized Local 42 to negotiate a contract on its own, and that the company was **at all times aware** that any agreement reached was subject to the approval of the international" (Br. 6) (Emphasis added). It is clear, however, that the Board did not make any such finding that the company was aware of a requirement for International approval at the time the agreement was entered into, and that the Board and the Court of Appeals both relied on the untimely telegram of July 16 in approving the International's rejection of the contract. The issue posed by petitioner is presented in this record.

2. First, it is significant that the government quotes only the court and not the Board (Br. 6). As its Brief indicates (p. 5) the Trial Examiner and the Board found **only** that the limitations on the Local's authority were communicated to the company "before **execution** of the 1963 labor contract" on July 18. Moreover, the Board relied on the belated July 16 telegram in making this finding (A. R. 225). There was no finding that the company was "at all times" aware of any such limitation—much less that the company was aware of the requirement of International approval on July 13 when it entered into the agreement with the Local.

3. Second, while it is of course true that the Court of Appeals may not make its own findings and enforce a Board order on a basis other than that found by the Board, even the portion of the Court's opinion quoted by the Board (Br. 6-7, n. 3) does not constitute a finding by the Court that the company was "at all times" aware

of a limitation on the Local's authority. It is clear that the Court did not attempt to determine what the company's knowledge was on July 13, 1963. Indeed, the Court (Pet. 31) found that the contract was "entered into" on July 18, while the Board found only that the contract was "executed" on that date (A. R. 221, 225, 226). Moreover, the Court relied on the July 16 telegram and if—as apparently all concede[1]—that telegram arrived after agreement was reached subject to ratification, it was obviously improper for the court to rely on it in upholding the Board's failure to bargain finding. This impropriety rests on the very issue tendered by petitioner: that a union may not limit its negotiators' authority when agreement has already been reached subject only to employee ratification. The July 16 telegram which arrived after agreement was reached on July 13 but before execution on July 18 was clearly untimely and should not have been considered by the Board or the court in determining whether Local 42 had apparent authority.

4. Moreover, the government's asertion that the Board and the Court found that the company was "at all times" aware of the Local's limited bargaining authority flies in the face of uncontradicted evidence that the Local, not the International, was the party to every contract negotiated by the company from 1955 on (A. R. 67, 249, 68, 252, 5, 237, 241, 244); that the International did not sign or ap-

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[1] As the charging party in its Brief before the Trial Examiner, p. 3, declared: "On July 13 representatives of [the company] again met with representatives of Local 42. At this meeting the parties agreed to the terms and conditions of the agreement dated July 16, 1963 [actually July 18], subject to the approval of the membership of Local 42. On July 17, 1963 the Union, by telegram, advised [the company] that the purported agreement with Local 42 was of no force and effect and demanded that [the company] bargain with the Union. Subsequent to the receipt of this telegram representatives of [the company] and Local 42 on July 18, 1963 executed the agreement in the office of the President of [the company]."

prove the 1957 contract (A. R. 67-8, 69, 71-72, 224, 252, 258); that the International Vice President's signature line on the 1963 contract indicated simply that he was signing as one of Local 42's negotiators in the 1963 bargaining sessions (A. R. 110, 113, 114, 120, compare 249); that International President Boyle had at no time prior to July 16 advised the Company of any limitation on the Local's authority to bargain because "I didn't think it was necessary" (A. R. 66); that International Vice-President Calvert testified similarly that the company was not advised of any such limitation, that he knew of the July 12 bargaining session, advised the Local officers of the changed meeting place and conferred with them at noon as to progress in the negotiations without ever objecting to the company negotiating with the Local (A. R. 47); and that company President Boswell thought he was bound to negotiate with Local 42 (A. R. 85). Clearly, without the July 16 telegram, the Board's finding that the Local lacked apparent authority is based solely on highly ambiguous facts, conjecture and surmise. The timeliness and effect of the July 16 telegram is without question the cruical issue presented by this record, and the action by the Board in this case indicates that the Board believes any union limitation on its negotiators' authority prior to execution of an agreement is effective.[2]

II. Reply to Point 2.

1. Government counsel attempt to justify the Board's failure to include in paragraph 1 (b) the limitations which

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[2] As the Board argued in its Brief before the Court of Appeals, pp. 22-3, in attempting to distinguish **Sheet Metal Workers**, 120 NLRB 1678, 1689, from this case: "[In Sheet Metal Workers] [t]he identical procedure had been followed in 1956 as in 1954 and 1955—that is, agreement was reached, the employees approved the agreement, and the agreement was reduced to writing. **It was only after the final step** in the 1956 negotiations that the employer learned of the new limitations on the agent's power." (Emphasis added.)

this Court imposed upon a virtually identical order in **J. I. Case Co. v. NLRB**, 321 U. S. 332, 340-342 (1944), by distinguishing between lawful individual contracts which have been used to violate the Act and the contract with Local 42, here, which the Board held was both unlawfully executed and used to forestall collective bargaining (Br. 8, n. 4). Not only does no Board case of which we are aware recognize this purported distinction, but no reason is suggested why the **Case** limitations—that the Board has jurisdiction to abrogate a contract only to the extent necessary to remedy an unfair labor practice and that employee contract rights may not be preserved without also preserving employer defenses thereto—are not equally applicable whether it is an individual, or a collective agreement which the Board is condemning.[3]

> "Certainly the Board in its administration of the Act, has broad discretion in shaping remedies. However, the Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways. The Board has a responsibility to administer the Act fairly and rationally." **Burinskas v. NLRB**, 357 F. 2d 822, 827 (D. C. Cir. 1966).

The Board has here arbitrarily used a blunderbus where a rapier was called for.

2. After advising this Court that remedy provisions like paragraph 1 (b) "have been uniformly sustained" (Br. 8), the government concedes that **NLRB v. Golden State**, 353 F. 2d 667 (9th Cir. 1965), squarely conflicts with decisions requiring enforcement. Contrary to the government's suggestion (Br. 8, n. 5), there is no reason to believe that

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[3] Indeed, in **Western Cartridge Co.**, 44 NLRB 1, 30-1 (1942), **enforced**, 134 F. 2d 240, 246 (7th Cir.), **cert. denied**, 320 U. S. 746 (1943), although it did not utilize the **Case** limitations, the Board gave more elaborate treatment to the individual contracts it invalidated than it did to a collective bargaining agreement which it also voided.